IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
BENCH-III

C.A. – 143/(ND)/2018
C.A. – 174/(ND)/2018
In C.P. No. IB-189/(ND)/2017

In relation to Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

NAMDHARI FOOD INTERNATIONAL PVT. LTD.
307, NDM 2, Netaji Subhash Place,
Pitampura
New Delhi – 110034.

...Corporate Debtor

AND

C.A. – 143/(ND)/2018

In the matter of:

ANIL KATIA
SCO-2935-36, Level 1,
Sector – 22C,
Chandigarh.

...Resolution Professional

AND

C.A. – 174/(ND)/2018

In the matter of:

NATIONAL SPOT EXCHANGE LIMITED
Registered Office:
6th Floor, Chintamani Plaza,
Chakala Andheri Kurl Road,
Andheri (East),
Mumbai – 400099.

...Applicant/Objector

Coram:

R.VARADHARAJAN,
Hon'ble Member (Judicial)

Dr. V.K. SUBBURAJ
Hon'ble Member (Technical)

C.A. – 143/(ND)/2018:
Counsel for the Resolution Professional: Ms. Pooja Mahajan, Ms. Mahim Singh, Mr. Savar Mahajan, Advocates

C.A. – 174/(ND)/2018:
Counsel for the Objector: Mr. Virender Ganda, Sr. Advocate with Mr. Sandeep, Mr. Anuj Tewari, Ms. Shelly Khanna, Mr. Ajeyo Sharma, Advocates

Counsel for Resolution Applicant: Nitin Mishra, Advocate

ORDER

Date: 13 .03.2018

1. The present order deals with two applications. The first application C.A. 143/(ND)/2018 is an application which has been filed by the Resolution Professional ("RP") seeking approval of the resolution plan submitted by the resolution applicant ("RA") Rajinder Singh Sandhu. The second application C.A. 174/ND/2018 has been filed by National Spot Exchange Limited ("NSEL") objecting to the resolution plan filed by the RA and seeking rejection of the same.

2. The present proceedings were initiated by the filing of an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("the Code") by the financial creditor State Bank of India ("SBI") which was admitted vide order dated 30.08.2017 where Mr. Anil Katia was appointed as the interim resolution professional, who also continues to be the resolution professional ("RP") presently in this matter.

3. The RP has submitted the progress reports from time to time and the meetings of the committee of creditors ("CoC") were held as prescribed

under the Code. On 20.12.2017 an Expression of Interest ("EOI") for inviting resolution plans for the Corporate Debtor ("CD") was published in Business Standard but no response to the EOI was received. A second EOI was published on 11.01.2018 in response to which interest was shown by four prospective applicants. The CoC further decided to reduce the net worth eligibility criteria for submitting resolution plans from Rs. 10 crores to Rs. 4 crores and thus, a third EOI was published. Ultimately from the four prospective applicants only two applicants – Shri Nanak Singh and Shri Rajinder Singh Sandhu – were found eligible to submit resolution plans. However, Shri Nanak Singh withdrew from the process and the only resolution plan which was submitted to the CoC was of Rajinder Singh Sandhu. On 23.05.2018 the resolution plan was approved by a 100% vote of the CoC, consisting of the sole financial creditor SBI.

4. The CD is engaged in milling and boiling of paddy, sorting/processing and sale (including export) of rice. The CD became operational by taking over the assets, liabilities and overall business of the erstwhile partnership firm namely M/s Namdhari Food International in which Sh. Iqbal Singh, Sh. Surjeet Singh and Sh. Inder Singh were partners. The CD went into financial distress due to unseasonal rains, ban on rice exports, increase in minimum

support price for procurement of buffer stocks, volatility in the prices of both rice and paddy etc.

5. The RA Rajinder Singh Sandhu in his individual capacity is carrying on the business of manufacturing of tiles and allied products under the name and style of M/s Sandhu Tile Industries and has a business experience of over 20 years. The RA holds 1.12% share of the CD, his sister Karamjit Kaur holds 3.10% share of the CD and his sister's husband Surjeet Singh is an outgoing promoter and guarantor of the CD. Thus, the RA is the brother-in-law of an outgoing promotor and guarantor of the CD. The RP states that this fact was known before the resolution plan was submitted and the financial creditor namely SBI was informed about it but it did not raise any objections in relation to it.

6. Even though SBI being the sole financial creditor and thereby possessing 100% voting strength in the CoC has approved the resolution plan, however, being the Adjudicating Authority named under the Code, this Tribunal has to exercise its judicial discretion as per Section 31 of the Code while approving or rejecting the resolution plan as brought before this Tribunal by the RP after due approval of CoC with the requisite strength prescribed and for this

purpose it is required to be guided by the conditions which are prima facie required to be satisfied and as contained in Section 30(2) of the Code which are extracted below for easy reference:

> *"30. Submission of resolution plan. –*
>
> ***
>
> *(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -*
> *(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;*
> *(b) provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;*
> *(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;*
> *(d) The implementation and supervision of the resolution plan;*
> *(e) does not contravene any of the provisions of the law for the time being in force*
> *(f) confirms to such other requirements as may be specified by the Board."*

7. An overview of the ingredients of the resolution plan and its compliance/non-compliance with the ingredients specified in Section 30 of the Code and attendant regulations is mentioned below:

Condition	Compliance under Resolution Plan
S. 30(1) – resolution applicant	The resolution applicant has

submits affidavit stating that he is eligible under Section 29A	submitted an affidavit to this effect but as discussed in paragraphs 8-13 the resolution applicant is actually ineligible under Section 29A.
S. 30(2)(a) – provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor.	CIRP cost amounting to Rs. 0.379 crores have already been paid and the remaining cost of Rs.01571 crores will be paid by the RA in priority to other creditors (Pg. 27 of resolution plan)
S.30(2)(b) - provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the CD under section 53. Regulation 38(1) – amount due to the	Operational creditors including the trade creditors but excluding related party creditors and NSEL will be paid on pro rata basis on receipt of respective claims and verification thereof by the RA, at the rate of 30% of the claimed amount within the maximum period of two years from the date of approval of plan by this

operational creditors under a resolution plan shall be given priority in payment over financial creditors.	Tribunal and remaining liability will be written off. All claims even those rejected, if substantiated along with the one not considered by the resolution professional will be treated at par with operational creditors who have not filed claims and will be entitled for pro rata amount. (pg. 32-33 of the resolution plan) As discussed in paragraphs 14-16 the payment plan stated in the resolution plan falls foul of the order of the Hon'ble Supreme Court and the Hon'ble NCLAT.
Regulation 38(1A) – a resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial	a. CIRP cost amounting to Rs. 0.379 crores have already been paid and the remaining cost of Rs.01571 crores will

creditors and operational creditors, of the corporate debtor.	be paid by the RA in priority to other creditors. b. An amount of Rs.0.50 crore has been deposited with SBI as earnest money. An amount of Rs.0.65 crore will be paid to SBI within one month on approval of the proposed resolution plan by this Tribunal. An amount of Rs.0.35 crores will be paid to SBI within 3 months on approval of resolution plan by this Tribunal. Rs.1.94 crores with interest will be paid by way of release of FDR lying with Hon'ble MPID Court and if the FDR is not released then the RA will pay the amount at

	the end of 2 years by way of bullet payment. The balance of Rs.8.06 crores will be paid after detachment of properties from Hon'ble MPID Court and ED or order of the Hon'ble NCLT, whichever is later. Thus, the payment of the amount to SBI is conditional on detachment of the concerned properties. c. Operational creditors including the trade creditors but excluding related party creditors and NSEL will be paid on pro rata basis on receipt of respective claims and verification thereof by the RA, at the rate of 30% of the

	claimed amount within the maximum period of two years from the date of approval of plan by this Tribunal and remaining liability will be written off. All claims even those rejected, if substantiated along with the one not considered by the resolution professional will be treated at par with operational creditors who have not filed claims and will be entitled for pro rata amount. No amount against the admitted amount of Rs.51.02 crores will be paid to NSEL. d. No utilities bills are outstanding.

	e. The outstanding statutory dues have been paid during the period of CIRP. f. The due amount of Rs.7,21,361/- shall be paid in full to the workmen/employees within one month from the date of approval of the plan. g. The RA has sought waiver of the disputed claims of the Income Tax and Sales Tax/VAT amounting to Rs.1,27 crores and Rs.26.21 crores, respectively. As discussed in paragraphs 12-16 the payment plan stated in the resolution plan falls foul

	of the orders of the Hon'ble NCLAT and the Hon'ble Supreme Court.
S.30(2)(c) – provides for the management of the affairs of the CD after approval of the resolution plan	After approval the CD will be owned, managed and controlled by the RA. A new Board of Directors will be appointed consisting of the RA, Ravneet Kaur (wife of RA) and such additional directors as considered fit and required by law. (pg. 37 of the resolution plan)
S.30(2)(d) – The implementation and supervision of the resolution plan	RA undertakes to infuse the funds from independent sources and proposes to appoint a monitoring and supervising professional/agency as would be decided by SBI and the cost of the same will be borne by the RA.

Regulation 38(3): (a) addresses the cause of default; (b) feasible and viable; (c) has provisions for its effective implementation; (d) has provisions for approvals required and the timeline for the same; (e) resolution applicant has the capability to implement the resolution plan	As discussed in paragraphs 17-19, the conditionality of the plan makes it ineffective and indefinite.
S.30(2)(e) - does not contravene any of the provisions of the law for the time being in force	The plan contravenes Section 29A of the Code and the conditions regarding release of promoters'/guarantors' properties is beyond the scope of the provisions of the Code.
S.30(4) - The committee of creditors may approve a resolution plan by a	CoC has approved the resolution plan by a vote of 100% by SBI

vote of not less than sixty-six per cent. of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board	which is the sole financial creditor. However, as discussed in paragraphs 20-24 the procedure undertaken to vote on the resolution plan was irregular.

Eligibility of Resolution Applicant

8. It is pertinent to note that one of the conditions which is required to be satisfied and as provided in clause (e) of sub-section (2) of Section 30 is that the resolution plan does not contravene any of the provisions of the law for the time being in force, which obviously will include the provisions of the Code as well and more specifically Section 29A of the Code. Thus, first a reference is required to be made to Section 29A of the Code which states who is ineligible to be a resolution applicant:

> *"29A. Persons not eligible to be resolution applicant. -*
> *A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—*
>
> *(a) is an undischarged insolvent;*

(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);

(c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan:

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.- For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

Explanation II.— For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a

period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

(d) has been convicted for any offence punishable with imprisonment –

(i) for two years or more under any Act specified under the Twelfth Schedule; or

(ii) for seven years or more under any law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause(iii) of Explanation I;

(e) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013):

Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:

Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued

transaction, extortionate credit transaction or fraudulent transaction;

(h) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;

(i) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i).
Explanation I. — For the purposes of this clause, the expression "connected person" means—
(i) any person who is the promoter or in the management or control of the resolution applicant; or
(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or
(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date;

Explanation II—For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:—

(a) a scheduled bank;
(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;
(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);
(d) an asset reconstruction company register with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
(e) an Alternate Investment Fund registered with Securities and Exchange Board of India;
(f) such categories of persons as may be notified by the Central Government."

9. The extract above is how Section 29A stands presently after it was last amended with effect from 06.06.2018. The ineligibility under this section applies not only to the resolution applicant but also to persons *'acting jointly or in concert'* with the resolution applicant. The Code does not define the term 'acting in concert' and thus, the definition given in the SEBI (Substantial Acquisition of Shares and Takeover) Regulations 2011 ("Takeover Regulations") will have to be referred to, which was also applied by the Hon'ble Supreme Court in *Arcelormittal India Pvt. Ltd. vs. Satish*

Kumar Gupta & Ors. while construing the said term taking into consideration Section 3(23) of the Code. Regulation 2(1)(q) of the Takeover Regulations defines 'persons acting in concert' as follows:

> *"(q) "persons acting in concert" means,— (1) persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.*
>
> *(2) Without prejudice to the generality of the foregoing, the persons falling within the following categories shall be deemed to be persons acting in concert with other persons within the same category, unless the contrary is established —*
>
> *(j) a company, its holding company, subsidiary company and any company under the same management or control;*
>
> *(ii) a company, its directors, and any person entrusted with the management of the company;*
>
> *(iii) directors of companies referred to in item (i) and (ii) of this sub-clause and associates of such directors;*
>
> *(iv) promoters and members of the promoter group;*
>
> *(v) immediate relatives;*
>
> *(vi) a mutual fund, its sponsor, trustees, trustee company, and asset management company;*
>
> *(vii) a collective investment scheme and its collective investment management company, trustees and trustee company;*

(viii) a venture capital fund and its sponsor, trustees, trustee company and asset management company;

(viiia) an alternative investment fund and its sponsor, trustees, trustee company and manager;

(ix) [***]

(x) a merchant banker and its client, who is an acquirer;

(xi) a portfolio manager and its client, who is an acquirer;

(xii) banks, financial advisors and stock brokers of the acquirer, or of any company which is a holding company or subsidiary of the acquirer, and where the acquirer is an individual, of the immediate relative of such individual:

Provided that this sub-clause shall not apply to a bank whose sole role is that of providing normal commercial banking services or activities in relation to an open offer under these regulations;

(xiii) an investment company or fund and any person who has an interest in such investment company or fund as a shareholder or unitholder having not less than 10 per cent of the paid-up capital of the investment company or unit capital of the fund, and any other investment company or fund in which such person or his associate holds not less than 10 per cent of the paid-up capital of that investment company or unit capital of that fund:

Provided that nothing contained in this subclause shall apply to holding of units of mutual funds registered with the Board;

Explanation.—For the purposes of this clause — "associate" of a person means,—
(a) any immediate relative of such person;
(b) trusts of which such person or his immediate relative is a trustee;
(c) partnership firm in which such person or his immediate relative is a partner; and

(d) members of Hindu undivided families of which such person is a coparcener;"

10. According to Reg. 2(q)(2) of the Takeover Regulations the persons listed thereunder are deemed to be acting in concert, which also includes immediate relatives. The term 'immediate relatives' is defined in Regulation 2(l) in the following words:

"immediate relative means any spouse of a person, and includes parent, brother, sister or child of such person or of the spouse;"

11. Thus, immediate relatives include spouse's brother and the RA and the outgoing promoter/guarantor Surjeet Singh fall in the category of immediate relatives as Surjeet Singh is married to the RA's sister. Thus, the RA and Surjeet Singh are acting in concert on a combined reading of Section 29A of the Code and the above quoted provisions of the Takeover Regulations. The presumption created by Regulation 2(1)(q)(2)(v) is a rebuttable presumption and the RA has tried to convince this Tribunal by stating in its reply that neither the objector NSEL has disclosed any evidence in support of such a claim nor the CoC has been convinced of any such allegation and by stating on affidavit that that he is not ineligible to submit the resolution plan. However, the fact that under the garb of the resolution plan the RA has prayed that the properties of Surjeet Singh (page 25 of the resolution plan)

be released from the attachments they are subjected to by other courts and the entire resolution plan has been made conditional on the removal of such attachments of Surjeet Singh's properties creates a genuine doubt in this Tribunal's mind about the modus operandi of the RA and furthers the conclusion that the RA and Surjeet Singh are operating or acting in concert. Thus, since Surjeet Singh is ineligible to be a resolution applicant under Section 29A (c) and (h) of the Code, the RA, Rajinder Singh Sandhu is also ineligible to submit a resolution plan.

12. Further, note should be taken of the observations made by the Hon'ble Supreme Court in *Arcelormittal India* which are as follows:

> *"Since Section 29A(c) is a see-through provision, great care must be taken to ensure that persons who are in charge of the corporate debtor for whom such resolution plan is made, do not come back in some other form to regain control of the company without first paying off its debts. The Code has bifurcated such persons into two groups, as a perusal of sub-clauses (c) and (g) of Section 29A shows. If a person has been a promoter, or in the management, or control, of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place, and in respect of which an order has been made by the Adjudicating Authority under the Code, such person is ineligible to present a resolution plan under Section 29A(g). This ineligibility cannot be cured by paying off the debts of the corporate debtor. Therefore, it is only such persons who do not fall foul of sub-clause (g), who are eligible to submit resolution plans under sub-clause (c) of Section 29A, if they happen to be persons who were in the erstwhile management or control of the corporate debtor.*

57. It is important for the competent authority to see that persons, who are otherwise ineligible and hit by sub-clause (c), do not wriggle out of the proviso to sub-clause (c) by other means, so as to avoid the consequences of the proviso. For this purpose, despite the fact that the relevant time for the ineligibility under subclause (c) to attach is the time of submission of the resolution plan, antecedent facts reasonably proximate to this point of time can always be seen, to determine whether the persons referred to in Section 29A are, in substance, seeking to avoid the consequences of the proviso to sub-clause (c) before submitting a resolution plan. If it is shown, on facts, that, at a reasonably proximate point of time before the submission of the resolution plan, the affairs of the persons referred to in Section 29A are so arranged, as to avoid paying off the debts of the non-performing asset concerned, such persons must be held to be ineligible to submit a resolution plan, or otherwise both the purpose of the first proviso to sub-section (c) of Section 29A, as well as the larger objective sought to be achieved by the said sub-clause in public interest, will be defeated."

The above observation of the Hon'ble Supreme Court shows that one of the purposes behind Section 29A of the Code is to ensure that the outgoing promoters of a corporate debtor do not unjustly regain control of the corporate debtor without paying off the debts. Although the Hon'ble Supreme Court has only discussed a situation where the prospective applicants may try to wriggle out of the disqualification, the warning, attached with such example, to the effect that care should be taken that the larger objective of the sub-clause should not be defeated applies in the present case as well, where 11 months have passed between the

classification of the CD as NPA and commencement of the CIRP and not exactly a year as stated in sub-clause (c). Thus, the resolution plan of the RA deserves to be rejected on this ground alone.

Treatment of NSEL's Claim

13. The second issue that comes to light in relation to this resolution plan and has also been raised as an objection by NSEL is the treatment meted out to NSEL's claim. Before we discuss the facts relevant to this issue it would be helpful to discuss the principles which guide the treatment that has to be provided to the claims of all the creditors as stated in the recent judgment of the Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. & Anr.* where the Hon'ble Supreme Court observed as follows:

> *"45. Quite apart from this, the United Nations Commission on International Trade Law, in its Legislative Guide on Insolvency Law ["UNCITRAL Guidelines"] recognizes the importance of ensuring equitable treatment to similarly placed creditors and states as follows:*
>
> > *"Ensuring equitable treatment of similarly situated creditors*
> > *7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognizes that all creditors do not need to be treated identically, but in a manner that reflects the different*

bargains they have struck with the debtor. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of 95 damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by 12 UNCITRAL Legislative Guide on Insolvency Law ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganization and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided."

46. The NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Section 30(2)(b) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 05.10.2018, Regulation 38 has been amended. Prior to the amendment, Regulation 38 read as follows:

"38. Mandatory contents of the resolution plan.—
(1) A resolution plan shall identify specific sources of funds that will be used to pay the—

(a) insolvency resolution process costs and provide that the [insolvency resolution process costs, to the extent unpaid, will be paid] in priority to any other creditor;
(b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and
(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan."

Post amendment, Regulation 38 reads as follows:

"38. Mandatory contents of the resolution plan.— (1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors. (1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor. xxx xxx xxx"

47. The aforesaid Regulation further strengthens the rights of operational creditors by statutorily incorporating the principle of fair and equitable dealing of operational creditors' rights, together with priority in payment over financial creditors."

14.It is clear from the perusal of the above stated order of the Hon'ble Supreme Court that the resolution plan has to be equitable to all the creditors. It is also relevant to note that the Hon'ble NCLAT in its order *Binani Industries vs. Bank of Baroda & Anr.*, dated 12.09.2018 held that Regulation 38(1)(b) and (c) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution

Process of Corporate Persons) Regulations, 2016 ("CIRP Regulations") is inconsistent with the Code and should not be taken into consideration and any resolution plan discriminating between two sets of creditors on the basis of such regulations cannot be approved. Subsequently, vide amendment dated 05.10.2018 the Insolvency and Bankruptcy Board of India amended Regulation 38(1) which now only states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. This amendment was acknowledged by the Hon'ble NCLAT in its order dated 18.11.2018 namely, *Central Bank of India vs. Resolution Professional of Sirpur Paper Mills Pvt. Ltd. & Ors.* where again the Hon'ble NCLAT stated that a discriminatory plan will be against the concept of maximization of assets of corporate debtor on one hand and balancing the interests of stakeholders on the other hand. Thus, if a plan is discriminatory against one or more creditors it will be in violation of the provisions of the Code.

15. In the present case, there is no dispute as to the fact that NSEL's claim has been admitted by the RP, but the resolution plan provides no payment at all to NSEL for the satisfaction of its claim which is discriminatory against it as compared to other operational creditors giving it a locus to challenge the

resolution plan. The RA in its reply to NSEL's objections in C.A. 174/ND/2018 has justified the non-payment by stating that since the liquidation value payable to NSEL is NIL thus, no payment under the resolution plan is required to be provided. Further, the RA states that payment is being made to trade creditors but not being made to related party trade creditors and non-operational creditors such as NSEL because continuance of the CD without support from trade creditors will be impossible but no such crippling harm shall accrue from the non-payment to NSEL or related trade creditors. The contentions made by the RA do not stand in light of the observations made by the Hon'ble Supreme Court. The resolution plan is discriminatory against NSEL and thus, deserves to be rejected on a standalone basis on this ground.

Acquisition of Promoters' Properties by CD

16. Further, the objector NSEL has raised another objection against the resolution plan relating to the properties sought to be acquired by means of the resolution plan. The resolution plan on page 25 under Clause (c) and the heading 'Basis of Resolution Plan' provides a list of properties of the promotors/guarantors which are to be acquired by the CD for operation of the resolution plan. If the list in the resolution plan is compared with the list of properties which have been attached by the Hon'ble High Court of

Judicature at Bombay (annexed to C.A. 174/ND/2018) it can be seen that the list in the resolution plan includes individual properties owned by the outgoing promotors/guarantors of the CD, which have been attached by the Hon'ble High Court of Bombay. Further, the RA at page 38 of the resolution plan has prayed that the personal properties of the promotors/directors/guarantors of the CD mentioned in the resolution plan be handed over to the CD free from any encumbrances of any sort by any statutory authority or any government body/agency or by virtue of any direction of any other court of law including that of Hon'ble MPID Court, EOW and ED against pre-CIRP liabilities. Further, on page 47 of the resolution plan it is stated that the resolution plan is conditional on release of CD and other properties sought to be acquired under the resolution plan, which are held in the personal names of outgoing promoters/guarantors, from Hon'ble MPID court and ED through PMLA court and in case of non-release of properties the plan will stand withdrawn. It is not difficult to see that this relief prayed for by the RA is only a ruse to liberate the promoters' properties from the attachments they are subject to. Not only is this relief beyond the scope of this Tribunal and the Code, as it concerns the properties and proceedings related to persons other than the CD but also a mala fide use of the provisions of the Code. The laying down of pre-conditions which

are not conceivable raises doubts about the sincerity and the genuineness of the resolution plan as well as the intentions of the RA. In this context it is important to refer to the judgment of the Hon'ble Supreme Court in *State Bank of India vs. Ramakrishna & Anr.* where while interpreting Section 14 of the Code the Hon'ble Supreme Court observed as follows:

> *"17. Section 14 refers to four matters that may be prohibited once the moratorium comes into effect. In each of the matters referred to, be it institution or continuation of proceedings, the transferring, encumbering or alienating of assets, action to recover security interest, or recovery of property by an owner which is in possession of the corporate debtor, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said Section. A plain reading of the said Section, therefore, leads to the conclusion that the moratorium referred to in Section 14 can have no manner of application to personal guarantors of a corporate debtor.*
> ***
> *23. ...Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and coextensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them."*

17. Thus, it is seen that what cannot be directly achieved by the promoters/directors of the CD cannot be allowed to be achieved through indirect means under the guise of a resolution plan, thereby militating

against the very object of the Code as succinctly extracted by Hon'ble Supreme Court in the paragraph above. The answer can be only a resounding 'No'.

Conditional Resolution Plan

18. Further, the conditionality of the plan does not inspire confidence in this Tribunal that the plan is feasible or effective. It is dangerous to encourage a situation where the RA makes his resolution plan conditional on the satisfaction of reliefs which are unreasonable or beyond the scope of the Adjudicating Authority or have been made in bad faith. In fact, such a condition raises doubts regarding the effective implementation of the resolution plan regarding which the Adjudicating Authority has to satisfy itself according to Section 31 of the Code. The RA has stated in the resolution plan that the acquisition of the properties of the promoters/guarantors of the CD is integral for the revival of the CD and for a workable resolution plan as the lands beneath the buildings of CD are in the individual names of the promoters/guarantors. It should be kept in mind that the CIRP is primarily a process to explore the possibility of reviving a company, give the prospective applicants an opportunity to present their plans of revival and to select a plan for implementation if the plan is found feasible and in compliance with all applicable laws. If it so happens that a

company cannot be revived because any integral part/asset of the company is irretrievably blocked, then the company has to go into liquidation; the solution is not to approve a resolution plan conditional on grant of reliefs which would lead to a misuse of the provisions of the Code.

Procedure for Approving Resolution Plan

19. Further, it is not only the plan which is conditional but the approval given by the sole financial creditor SBI during the 9th CoC meeting dated 23.05.2018 is also conditional. It is seen from the minutes of the 9th CoC meeting that the CoC had asked the RA to supply further information and include the same in the resolution plan that will be submitted after suitably amending it, such as a letter from Bank of Baroda specifying the sum that it is willing to finance for the resolution plan, division of litigation expenses between the financial creditor and the RA and provision of implementation and monitoring agency for supervision of implementation of resolution plan. It was agreed that the revised resolution plan will be submitted to the CoC at the earliest and thus, the resolution passed was as follows:

> *"RESOLVED THAT the Resolution Plan dated 20/05/2018 submitted by the Resolution Applicant, Shri Rajinder Singh Sandhu, subject to changes agreed to by the Resolution Applicant, during the 9th CoC meeting, in the matter of Namdhari Food International Private Limited a Company under CIRP"*

20. No meeting of CoC was conducted after the 9th CoC meeting. The RP in its reply to CA 174/ND/2018 has stated that the revised plan dated 20.05.2018 was approved by the CoC at the 9th meeting held on 23.05.2018 with 100% voting share with certain modifications as suggested by SBI. The said suggestions were incorporated by the RA and the revised resolution plan with such modifications was sent to the RP on 26.05.2018, which was forwarded to the SBI by the RP. The RP examined the modified resolution plan and had discussions with SBI wherein SBI orally confirmed that it is satisfied with the modifications made by the RA to the RP. Hence, the application was filed by the RP for approval of the resolution plan by this Tribunal on 30.05.2018. Subsequently, at the request of the RP, SBI confirmed the same in writing to the RP vide letter dated 29.05.2018.

21. It is important to note that neither the provisions of the Code nor its attendant regulations provide for conditional approval of the resolution plans submitted to the CoC. The RP in his reply has tried to rely on Regulation 39(3) of the CIRP Regulations which reads as follows:

> *"(3) The committee may approve any resolution plan with such modifications as it deems fit."*

22. The above regulation does not give room for CoC to pass a conditional approval but only means that the CoC can approve resolution plans which include such modifications to the original plan as the CoC deems fit. Thus, the approval given on the 9th meeting is a conditional approval given to a resolution plan which was not in its final form but still under discussions. The final form was received by the RP on 26.05.2018 which the RP forwarded to SBI, which then gave its oral confirmation to the resolution plan. There are several material irregularities in this procedure followed by the RP. First, the RP bypassed the procedure of calling a meeting to discuss the resolution plan in its final form, in which NSEL would have also been a participant according to Section 24(3)(c) of the Code. The Hon'ble Supreme Court in its recent decision *Vijay Kumar vs. Standard Chartered Bank & Ors.*, has strongly emphasized the importance of the role of the participants of the CoC meetings in the following words

> *"This statutory scheme, therefore, makes it clear that though the erstwhile Board of Directors are not members of the committee of creditors, yet, they have a right to participate in each and every meeting held by the committee of creditors, and also have a right to discuss along with members of the committee of creditors all resolution plans that are presented at such meetings under Section 25(2)(i). It cannot be gainsaid that operational creditors, who may participate in such meetings but have no right to vote, are vitally interested in such resolution plans, and must be furnished copies of such plans beforehand if they are to participate effectively in the meeting of the committee of creditors. This is for the reason that*

under Section 30(2)(b), repayment of their debts is an important part of the resolution plan qua them on which they must comment. So the first important thing to notice is that even though persons such as operational creditors have no right to vote but are only participants in meetings of the committee of creditors, yet, they would certainly have a right to be given a copy of the resolution plans before such meetings are held so that they may effectively comment on the same to safeguard their interest."

23. However, in the instant case the RP did not call a meeting of the CoC to approve the final draft of the resolution and further, did not even supply a copy of the final draft of the resolution plan to the other participant of the CoC meetings i.e. NSEL. Second, the RP filed the present application before this Tribunal on the basis of a conditional approval and the written non-conditional approval of SBI dated 29.05.2018 was submitted to this Tribunal only on 25.07.2018 as a response to NSEL's objection. Third, the application for approval of resolution plan was filed on 30.06.2018 when the CIRP period of 270 days had expired on 26.05.2018. Thus, the resolution plan was submitted after expiry of CIRP period and as on the date of the expiry of the CIRP period there was no resolution plan before this Tribunal, which according to Section 33(1)(a) of the Code calls for initiation of liquidation of the CD and as construed as well by the Hon'ble Supreme Court in *K. Shashidhar vs. Indian Overseas Bank & Ors.* as follows:

"33. ...From the legislative history and the background in which the I & B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given Under Section 22 of Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken...

***

60. In the first place, amendment to Regulation cannot have retrospective effect so as to impact the decision of the CoC of the concerned corporate debtor - taken before the amendment of the said Regulation. There is no indication in the Code as amended or the Regulations to suggest that as a consequence of this amendment the decisions already taken by the concerned CoC prior to 3rd July, 2018 be treated as deemed to have been vitiated or for that matter, necessitating reversion of the proposal to CoC for recording reasons, that too beyond the statutory period of 270 days. A new life cannot be infused in the resolution plan which did not fructify within the statutory period, by such circuitous route."

24. Thus, for all the aforestated reasons, the resolution plan is not approved and the application filed by the RP is dismissed and the application filed by the objector, in view of the said dismissal, succeeds. In light of this observation, the CD Namdhari Food International Pvt. Ltd. is required to be liquidated in terms of Section 33 of the Code and in relation to which the following further directions are issued:

a. This Tribunal orders for liquidation of the Corporate Debtor and in the circumstances the CD stands liquidated and the incidence of liquidation to follow, on and from the date of this order in terms of provisions of the Code and more particularly as given in Chapter III of the Code and also in terms of Insolvency and Bankruptcy (Liquidation Process) Regulations, 2017 ("Liquidation Regulations").

b. The present resolution professional cannot be appointed the liquidator as Section 34(4)(a) of the Code requires this Tribunal to replace the resolution professional if the resolution plan is rejected due to failure to meet the requirements mentioned in Section 30(2). Section 34 further requires that this Tribunal may direct the Insolvency and Bankruptcy Board of India ("IBBI") to refer the name of another insolvency professional to be appointed as liquidator.

c. This Tribunal after referring to the list provided by IBBI for appointment of insolvency professionals appoints Mr. Rakesh Kumar Gupta (e-mail: rkg.delhi.ca@gmail.com) as the liquidator for the present liquidation. The liquidator shall issue the public announcement that the CD is in liquidation and file his report to this Tribunal as mandated in terms of the Liquidation Regulations.

d. In relation to officers/employees and workmen of the CD, taking into consideration Section 33(7) of the Code, this order shall be deemed to be a notice of discharge.

e. The liquidator appointed shall investigate the financial affairs of the CD particularly, in relation to preferential transactions/undervalued transactions and such other like transactions.

f. The liquidator shall also submit a preliminary report to this Tribunal within 75 days from date of commencement of liquidation in accordance with the regulations.

g. A copy of this order shall be communicated to the Registrar of Companies, NCT of Delhi and Haryana.

h. The liquidator shall intimate the Registrar of Companies, NCT of Delhi and Haryana forthwith about the liquidation process of the CD being set in the motion. In terms of Section 178 of the Income Tax Act, 1961, the liquidator shall give necessary intimation to the Income Tax Department. In relation to other fiscal and regulatory authorities which govern the CD, the liquidator shall also duly intimate about the order of liquidation.

i. The CIRP of the CD comes to a close and moratorium granted under Section 14 of the Code at the time of admission also lifted but the provisions of Section 33(5) and 33(6) shall apply.

—Sd—
13/3/2019

(Dr. V.K. SUBBURAJ)
MEMBER (TECHNICAL)

—Sd—
13/03/2019

(R. VARADHARAJAN)
MEMBER(JUDICIAL)

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